STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion	:	**Docket No. 11-0624**
Amendments to 83 Ill. Adm. Code 737	:	

REPLY BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

NOW COMES the Staff of the Illinois Commerce Commission ("Staff") and files its Reply Brief on Exceptions to the Cable Television and Communications Association of Illinois ("Competitive Providers") Brief on Exceptions To Proposed Second Notice Order filed on April 17, 2012 (CP BOE). For the reasons set forth in this Reply Brief on Exceptions, the Competitive Providers arguments regarding the alleged deficiencies in the Proposed Second Notice Order should be rejected.

The consistent theme throughout the Competitive Providers' Brief on Exceptions is that the General Assembly intended to "provide uniformity in regulation between providers" (CP BOE at 4) or "level the playing field" (CP BOE at 5), and that the Part 737 adopted in the Proposed Second Notice Order "establishes separate but similar requirements for competitive services provided by competitive providers and by Electing Providers that would inadvertently result

in disparate treatment of the two groups of providers inconsistent with the Act as amended" (CP BOE at 4).

Part 737, as adopted in the Proposed Second Notice Order, provides carriers with a perfectly level playing field and treatment as called for under the Public Utilities Act. Pursuant to Section 13-506.2, any telecommunications carrier that is subject to regulation pursuant to Section 13-504 or Section 13-505 or alternative regulation pursuant to Section 13-506.1 need only file a written notice of election for market regulation with the Commission in order to have its retail telecommunications services solely determined and regulated pursuant to the market regulation of Section 13-506.2 (220 ILCS 5/13-506.2). Thus, any competitive carrier can, by electing market regulation, be regulated pursuant to Part 737 as adopted in the Proposed Second Notice Order. Thus, competitive carriers have it within their sole power to elect market regulation and eliminate the disparity in competitive retail regulatory treatment.

Furthermore, the language of the PA 96-0927 makes perfectly clear the General Assembly's intent in enacting the law. In order to "eliminate outdated regulation to level the playing field" the General Assembly created a new regulatory structure deemed "market regulation for competitive retail services" and included a new section within the Public Utilities Act (220 ILCS 5/13-506.2). The General Assembly made this regulatory structure available to all retail service providers in Section 13-506.2 (220 ILCS 5/13-506.2). Had the General

Assembly intended that there be a single regulatory system for both retail providers that elect market regulation as well as for those that don't, which would be the result of adopting the Competitive Providers' recommendation that "all competitive services be included in the new Part 737" (CP BOE at 2), it could have simply amended the existing regulatory structure for competitive providers rather than create a new form of regulation. It did not.

The Competitive Providers argue that it is immaterial whether they have the sole power to obtain the parity they seek because, they argue, the Illinois Commerce Commission's ("Commission") rules must "comport with the Act" and "must not circumvent the Act and legislative intent with a regulatory scheme contrary to the intent of the General Assembly" (CP BOE at 6). PA 96-0927 created market regulation and Part 737 subjects carriers that are subject to that market regulation to service quality rules that conform with market regulation. Nothing in Part 737 as it applies to Electing Providers is inconsistent with PA 96-0927. The Competitive Providers do not claim that Part 737 improperly applies market regulation to Electing Providers. Rather, the Competitive Providers argue that the General Assembly intended for the Commission to modify its rules with respect to carriers that choose not to elect market regulation. However, the General Assembly, with a limited number of exceptions specifically included in the proposed amendments to Part 730 and Part 732 in companion dockets at the Commission (i.e. ICC Docket No. 11-0622 and ICC Docket No. 11-0623, respectively), did not amend the existing legislation that competitive retail

providers that do not elect market regulation are subject to. The Competitive Providers argument that Part 737 as adopted in the Proposed Order is inconsistent with, circumvents, or in any way conflicts with PA 96-0927 because it doesn't sufficiently alter rules applying to carriers that do not elect market regulation fails to consider that the General Assembly could have changed the statutes as they apply to carriers that do not elect market regulation, but, with limited exceptions, did not. The Proposed Order does not err in any way by retaining existing rules implementing parts of the statute that did not change with PA 96-0927. The General Assembly clearly and indisputably created a new and distinct form of regulation available to those carriers that choose it and not available to those that do not choose it.

The fact that the Competitive Providers could gain the parity they allegedly seek by electing market regulation is far from a defense of circumvention of the Act as the Competitive Providers would have the Commission believe (CP BOE at 6). It underscores that what the Competitive Providers are ultimately seeking here is not a level playing field. It is clearly the case that in seeking to obtain the advantages of market regulation without the concurrent commitments that attach to such election, the Competitive Providers are asking the Commission to create a tilted playing field so that they need not play on the level one the General Assembly created in Section 13-506.2. If the Competitive Providers wish to play on a level playing field, they should elect market regulation.

The Competitive Providers would have the Commission believe that there are few distinctions between the statutes that govern competitive retail providers that elect market regulation and those that do not (CP BOE at 5 and 6). That, however, is not true. For example, the Competitive Provides assert that the statutory requirements found in 220 ILCS 2/13-506.2(e)(1)(A)-(D) that apply to Electing Providers are the "same statutory requirements" found in 220 ILCS 5/13-712(d)(1)-(4) that apply to competitive retail providers that do not elect market regulation (CP BOE at 5). This is simply false. First, the requirements of 220 ILCS 2/13-506.2(e)(1)(A)-(D) are explicit requirements that must be followed and the Commission is given no discretion to add to them. Alternatively, the requirements in 220 ILCS 5/13-712(d)(1)-(4) are explicitly defined as minimum requirements. This is a particularly important distinction because, pursuant to Section 13-712(c), the Commission is given the explicit authority to promulgate the additional service quality rules found in Part 730 and Part 732. No comparable authority exists with respect to the Commission's ability to promulgate additional service quality rules for Electing Providers. Second, the requirements in 220 ILCS 5/13-712(d)(1)-(4) are subject to a much broader class of customers than are the requirements in of 220 ILCS 2/13-506.2(e)(1)(A)-(D). Most notable, the former apply to basic local exchange business customers while the latter do not. These are not trivial distinctions.

The Competitive Providers also identify differential treatment that the Commission simply cannot change without there being a change in the statute.

For example, the Competitive Providers argue that "[u]nder the Proposed Order's current proposals, although all residential and business services of Electing Providers would be classified as competitive by statutory definition (220 ILCS 5/13-506.2(c)), those services would be subject to less regulation than the same services of other competitive providers that would remain subject to Parts 730 and 732, instead of being included in Part 737" (CP BOE at 6). As noted above, however, the requirements in 220 ILCS 5/13-712(d)(1)-(4) are subject to a much broader class of customers than are the requirements in 220 ILCS 2/13-506.2(e)(1)(A)-(D). In particular, 220 ILCS 5/13-712(d)(1)-(4) are applicable to basic local exchange service defined as "residential and business lines used for local exchange telecommunications service as defined in Section 13-204 of this Act…" (220 ILCS 5/13-712(b)(2). 220 ILCS 2/13-506.2(e)(1)(A)-(D) apply to basic local exchange service defined as "either a stand-alone residence network access line and per-call usage or, for any geographical area in which such stand-alone service is not offered, a stand-alone flat rate residence network access line for which calls are not charged for frequency or duration…" and certain residential safe harbors (220 ILCS 2/13-506.2(e)(1)). The marked difference in application across customer classes is a statutory distinction explicitly created in PA 96-0927. The Commission cannot eliminate this distinction and, unaccountably, the proposed Part 737 rules submitted by the Competitive Providers do not appear to reflect it.

Finally, the Competitive Providers assert that: “the Commission will benefit from an oral presentation regarding the important public policy issues addressed in this Brief on Exceptions that affect not only the instant rulemaking but numerous other rulemaking proceedings currently pending.” (CP BOE at 11-12) The Competitive Providers are wrong, as they have been throughout. In this proceeding, the Commission is called upon to accomplish the straightforward task of promulgating rules as a result of PA 96-0927. The “important public policy issues” to which the Competitive Providers refer have already been resolved by the General Assembly, albeit in a manner that the Competitive Providers do not like. In short, oral argument would not benefit the Commission here, because there is absolutely nothing of substance to argue about.

Finally, the Competitive Providers made the exact same request for oral argument in Docket No. 11-0622, which the Commission denied by a vote of 5 to nothing. (Docket No. 11-0622, Notice of Commission Action, February 24, 2012; Tr., February 23, 2012 Bench Session, pp. 23-24) The Competitive Providers oral argument request should be denied in this matter as well.

CONCLUSION

For all the reasons above, the Commission should reject in their entirety the Exceptions submitted by the Competitive Providers.

Respectfully submitted,

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